

OFFICE OF SPECIAL MASTERS

No. 02-399V

Filed: May 25, 2005

Austin Kile Kempton, by MARK KEMPTON
and ANGELA KEMPTON, as parents and
natural guardians,

Petitioners,

v.

SECRETARY OF HEALTH AND HUMAN
SERVICES

Respondent.

Not to be published.

To be posted on court website.¹

ORDER DENYING MOTION TO DISMISS

Based upon petitioners' Notice filed on August 8, 2002, and their filing of December 6, 2004, in which petitioners represent that the vaccinee received “* * *numerous vaccinations containing thimerosal within the applicable three year statute of limitations* * *,” it appears that petitioners have amended their petition to adopt the Master Autism Petition for Vaccine Compensation found at Exhibit A of *Autism General Order #1*, 2002 WL 31696785 (Fed. Cl. Spec. Mstr. July 3, 2002). Thus, they now allege that Austin was injured by a *series* of thimerosal-containing vaccinations, rather than the vaccination mentioned in the petition. Accordingly, as with other similar cases, I believe that it makes sense to defer determination of the timeliness issue in this case. Once I have ruled on the general causation issue described in *Autism General Order #1*, if the petitioners attempt to prove “causation” in this specific case, we can *at that time* assess whether the petition was timely filed. There is no need to do so at this time. (I note, however, that in cases in which the available medical records *do* clearly indicate that the first symptom predated the filing of the petition by more than three years, I will continue to dismiss such cases, as I have in the past. *See, e.g., Weinstein v. HHS*, No. 02-2059V, 2004 WL 3088663 (Oct. 25, 2004), *aff’d sub nom. Hebert v. HHS*, ___ Fed. Cl. ___ (2005); *Tucker v. HHS*,

¹Because this document contains a reasoned explanation for my action in this case, I intend to post this order on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). Therefore, as provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction “of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy.” Vaccine Rule 18(b). Otherwise, this entire document will be available to the public. *Id.*

No. 03-0346V, 2004 WL 950012 (Fed. Cl. Spec. Mstr. Apr. 15, 2004); *Kinsala v. HHS*, No. 03-1289V, 2004 WL 828459 (Fed. Cl. Spec. Mstr. Mar. 19, 2004).²

George L. Hastings, Jr.
Special Master

²Should the petitioners wish to decouple this petition from the Omnibus Autism Proceeding and proceed under some other theory, their counsel should contact my office, and I will set up procedure for evaluation of their claim. Otherwise, I will assume that they wish to continue to defer proceedings on this claim pending competition of the Omnibus Autism Proceeding.